PETITION NOT PRINTED

No. 41

IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

LESLIE IRVIN,

Petitioner,

v.

A. F. DOWD, WARDEN OF THE INDIANA STATE PRISON AT MICHIGAN CITY, INDIANA,

Respondent.

RESPONDENT'S BRIEF

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RESPONDENT'S BRIEF

Respondent accepts petitioner's statements as to the opinions below and the jurisdiction of this Court for the purpose of this appeal.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

In addition to the constitutional provision and statute set out in petitioner's statement respondent submits the following:

> "The following shall be good causes for challenge to any person called as a juror in any criminal trial:
>
> . . .

"Second. That he has formed or expressed an opinion as to the guilt or innocence of the defendant. But if a person called as a juror states that he has formed or expressed an opinion as to the guilt or innocence of the defendant, the court or the parties shall thereupon proceed to examine such juror on oath as to the ground of such opinion; and if it appears to have been founded upon reading newspaper statements, communications, comments or reports, or upon rumors or hearsay, and not upon conversation with witnesses of the transaction, or reading reports of their testimony, or hearing them testify, and the juror states on oath that he feels able, notwithstanding such opinion, to render an impartial verdict upon the law and evidence, the court, if satisfied that he is impartial and will render such verdict, may, in its discretion, admit him as competent to serve in such case."

* * *

Acts 1905, Ch. 169, Sec. 230, as found in Burns' Indiana Statutes (1956 Repl.), Section 9-1504.

QUESTIONS PRESENTED

The question presented here is whether or not the petitioner was afforded due process of law under the Fourteenth Amendment to the Constitution of the United States before and during his trial in the Gibson Circuit Court at Princeton, Indiana. In his brief he alleges the following as denials of due process based upon allegations of bias and prejudice in Gibson County where his trial occurred.

1. Jurors were permitted to serve who had a preconceived opinion as to petitioner's guilt.

2. The trial court's refusal to grant the second change of venue.

3. The trial court's action in denying a hearing on petitioner's motion for change of venue.

4. The overruling of petitioner's motions for continuance.

5. Trial court's action in denying a hearing on petitioner's motions for continuance.

Petitioner also alleges a denial of due process of law in the following respects:

1. The admission into evidence of a confession made by the petitioner.

2. The actions of the prosecuting attorney in participating as such attorney in the trial and also appearing as a witness on behalf of the State.

STATEMENT OF THE CASE

In his statement of the case petitioner sets out lengthy excerpts from the transcript on the *voir dire* examination which excerpts are accepted by the respondent as correct except that the respondent reserves the right to make specific reference to additional portions of the transcripts on *voir dire* for the purpose of emphasizing and clarifying the trial court's action with respect to the Indiana statute on qualification of jurors.

In his statement of the case in his brief at page 60 to page 68, the petitioner sets out a lengthy objection to the introduction into evidence of his confession which statement might lead this Court to believe the trial court did not conduct a hearing as to the admissibility of this confession.

Respondent would respectfully call this Court's attention to the trial court transcript vol. 2, page 1306, to vol. 3, page 1613, which contains the record of the hearing had in the trial court concerning the admissibility of petitioner's confession.

SUMMARY OF ARGUMENT

The State of Indiana, when faced with the duty of prosecuting Leslie Irvin for the murder of Whitley Wesley Kerr was presented with a problem which has long plagued law enforcement officers everywhere. The nature of the alleged crime had given rise to newspaper, radio and television publicity throughout the community and surrounding areas and in fact had been a major news story on the nation-wide wire services. Understandably the citizens of Vanderburgh County and in fact the citizens of Indiana, Kentucky and the surrounding States had been greatly alarmed by the nature of the crimes committed. However, at no time was there any threat of mob violence or any indication that the sheriff of Vanderburgh County would not be able to carry out his duty of protecting the prisoner, and presenting him for trial in the due course of events. The question of the publicity given to the crime and the arrest of the petitioner comes into focus only when one considers whether or not the jury which in fact tried the petitioner was biased and prejudiced against him. The *voir dire* examination discloses that each juror honestly stated that he had read news stories and heard radio broadcasts concerning the petitioner's arrest and the nature of the crime with which he was charged. However, each of these jurors was examined by the trial judge pursuant to the pertinent Indiana statute governing the qualification of jurors and each juror qualified under this

statute. Should this Court hold that the Indiana statute is unconstitutional it is seriously doubted whether any jury could ever be chosen to try a case of like proportions.

The questions raised by petitioner concerning a denial of a second change of venue are controlled by Indiana procedural law and petitioner has failed to demonstrate that he was prejudiced by proceeding to trial in Gibson County as opposed to proceeding to trial in any other county in the State of Indiana. It is respectfully submitted that due consideration must be given to the practicalities of conducting a trial on any given issue within reasonable distance of the residences of the witnesses who will be required to testify.

The trial court exercised sound discretion in refusing to grant a continuance in this cause for the reason that nearly eleven months had elapsed since the commission of the crime and nearly eight months had elapsed since the petitioner had been arrested.

Petitioner was not denied due process of law because of the testimony of the prosecuting attorney. The prosecutor did not purport to have any knowledge of the guilt or innocence of the petitioner other than what was related directly to him by the petitioner himself at an interview requested by the petitioner. This interview was had in the presence of other officers who also testified at the trial.

ARGUMENT

I

IN ANSWER TO PETITIONER'S CONTENTIONS UNDER PART 1 OF HIS ARGUMENT STARTING IN HIS BRIEF AT PAGE 76

Under the first point of his brief petitioner claims a violation of his constitutional rights in that he was forced to trial before a jury which he alleges was composed of jurors with a preconceived opinion that he was guilty. In support of this contention petitioner quotes from the dissenting Opinion of Judge Duffy of the Seventh Circuit wherein Judge Duffy stated that in his opinion the petitioner did not have a fair trial for the reason that more than half of the jurors who sat in the case had preconceived opinions that petitioner was guilty of the offense charged.

In writing his dissenting Opinion Judge Duffy cited two cases:

In re Murchison (1955), 349 U. S. 133, 75 S. Ct. 623, 99 L. Ed. 942;
Baker v. Hudspeth, 10th Circuit, 129 F. 2d 779.

While it is true that both of these cases state the general principle that the trier of fact must be without prejudice against the accused, neither case uses language which would be particularly applicable to the present situation.

In *In re Murchison*, this Court was concerned with a situation existing in Michigan wherein a single judge acts as a grand jury. In that case the same judge, who indicted the defendant also acted as trial judge in the trial of the

accused. This Court properly held that such a situation deprived the defendant of due process of law under the Fourteenth Amendment.

In *Baker v. Hudspeth*, the qualifications of one of the jurors was questioned because he was an assistant postmaster, which fact was unknown to the petitioner at the time he was selected. The Circuit Court of Appeals for the Tenth Circuit properly held that such a juror was not disqualified as having undue interest in the litigation.

Citing: *United States v. Wood* (1936), 299 U. S. 123, 57 S. Ct. 177, 81 L. Ed. 78.

Although the cases relied upon by Judge Duffy unquestionably hold that to be tried by jury made up of jurors with a preconceived opinion of the defendant's guilt would be a denial of due process, it is submitted that the authorities cited by Judge Duffy are not applicable to the actual situations existing in this case. Because of the wide dissemination of news in any given area where a crime may be committed it is essential that any given jurisdiction prescribed procedural steps whereby citizens who are called to jury duty in a case which has received wide publicity can be examined to determine if they are qualified to serve irrespective of the fact that they may have read, heard and discussed matters concerning the crime as reported by the various news dispensing agencies. Upon examination of the numerous cases which have discussed this problem it appears that the individual juror may be qualified if the information he has received has come solely through public news dispensing agencies.. Provided further that the news releases do not purport to include verbatim testimony of witnesses at previous hearings concern-

ing the same case. Petitioner makes no claim that the alleged bias and prejudice in the community affected the trial judge or interferred with his presiding at the trial. He relies solely upon the answers given by the prospective jurors from their *voir dire* examination. There is no question but what some of the jurors when questioned admitted a preconceived opinion that petitioner was guilty. This is a situation which has long been recognized by this Court and courts in other jurisdictions. As early as 1864, the Indiana Supreme Court made this observation from *Fabustock v. State* (1864), 23 Ind. 231, 236:

> "* * * The commission of a crime of the character of the one charged in this case, naturally produces more or less excitement in the vicinity of its enactment and with the various means of speedy communication existing almost everywhere in this country, intelligence of the act is very soon generally disseminated throughout the immediate communnity, and it would in many cases be impossible to find a jury, composed of men of ordinary intelligence, who had never heard of the case before being called into the jury-box. It is often impossible to avoid the formation of an opinion of some kind from mere hearsay or rumors. Such opinions, however, where the facts are only judged of by mere rumor, or the relation of persons not claiming to have any personal knowledge of them, would make but a slight impression on a mind of ordinary intelligence, and could scarcely form an impediment to a fair and proper conclusion from the legal evidence given on the trial. In this case the answer of the juror was, that he had partly formed an opinion from rumor, which would readily yield to the evidence. The question of his competency, under his statements, was left by the statute to the sound discretion of the court, and the facts do not show

an abuse of that discretion in refusing the challenge for cause. (Citing authorities.)"

The Indiana Legislature recognized this difficulty when adopted the present criminal code and sought to lay own a standard of qualification which would permit a ial court to proceed with a jury trial in the face of wide-read publicity in the community. The pertinent part of is statute reads as follows:

"• • •

"Second. That he has formed or expressed an opinion as to the guilt or innocence of the defendant. But if a person called as a juror states that he has formed or expressed an opinion as to the guilt or innocence of the defendant, the court or the parties shall thereupon proceed to examine such juror on oath as to the ground of such opinion; and if it appears to have been founded on reading newspaper statements, communications, comments or reports, or upon rumors or hearsay, and not upon conversation with witnesses of the transaction, or reading reports of their testimony or hearing them testify, and the juror states on oath that he feels able, notwithstanding such opinion, to render an impartial verdict upon the law and evidence, the court, if satisfied that he is impartial and will render such verdict, may, in its discretion, admit him as competent to serve in such case."

• • •

Acts 1905, Ch. 169, Sec. 230, as found in Burns' Indiana Statutes (1956 Repl.), Section 9-1504.

A search of the record reveals that the trial judge nstakingly applied this statute in questioning the jurors to the source of their information and as to their lity to disregard any information that they might have

acquired independent of the actual court room proceedings. The care with which the trial judge proceeded is demonstrated by the following excerpts from the record on the *voir dire* examination:

JUROR ERNEST HENSLEY testified that he had expressed an opinion as to the Petitioner's guilt or innocence and that it would require evidence directly from the Petitioner or somebody on his behalf to set aside that opinion. However, on further examination, he testified in substance that he would render his decision according to the evidence presented in court and that he understood that a person charged of a crime is innocent until proven guilty and that he would give the Petitioner the benefit of that principle of law and that if the State of Indiana failed by the evidence to prove the Petitioner guilty beyond any reasonable doubt, that he would acquit him and that the belief he entertained in his own mind was not strong enough to convict any man, that it would require evidence to convict him. He further testified that the opinion which he entertained at that time was based on what he read and that was the sole source of his information and that his mind was still open to the reception of evidence. He further testified that he would not consider any information that he had received outside the court room and would consider those matters that he had previously heard only if they were presented in open court.

(Tr., Vol. 5, p. 3659, l. 19 to p. 3667, l. 5.)

JUROR FRANK ROBINSON, in addition to the matter set out beginning at page 31 of Petitioner's brief, testified that he had expressed the opinion that defendant was guilty and that he had formed that opinion by reading news-

papers at that time. On further examination by the trial court the following appears in the record:

> "Q. Mr. Robinson, I believe on several occasions you have told the lawyers on both sides of the case and told me that regardless of any opinion that you might have once had as to the guilt or innocence of the defendant, that you could and would lay that opinion aside and decide this case solely and impartially upon the law and the evidence introduced in this court room.
>
> "A. I have.
>
> "Q. And that's the way you feel about it now?
>
> "A. I certainly do."
>
> (Tr., Vol. 6, p. 3890, ll. 12-21.)

JUROR DONALD HIGGINBOTHAM testified that he had formed an opinion as to the Petitioner's guilt or innocence. However, on examination, he testified that he realized that he would be required to base his opinion entirely on the law and the evidence and would be required to lay aside his opinion and not let that opinion influence his verdict and that if the State failed to prove beyond any reasonable doubt that the Petitioner was guilty, that he would return a verdict of not guilty and that if the State failed to prove its case he would find the Petitioner not guilty regardless of whether or not he took the stand or offered any witnesses in his favor, that the opinion he entertained was based on reading of newspapers and listening to the radio.

(Tr., Vol. 3, p. 2160, l. 3 to p. 2163, l. 13.)

Juror Clifford Montgomery felt that the Petitioner should testify in his own behalf. However, on further examination, this juror testified as follows:

> "A. I think not. I got confused on that yesterday. Not thoroughly understanding that the State of Indiana didn't require—gave the defendant the privilege of not having to testify in his own behalf, and if that's the law, that's the way I would try to decide it."
>
> (Tr., Vol. 4, p. 2630, ll. 6-10.)

Juror William Hensley testified that he had formed an opinion based upon the newspaper articles at the time of the alleged crime. This juror was questioned by the court in the following manner:

> "Q. Mr. Hensley, whether or not you could give this defendant a fair and impartial trial based solely upon the law and evidence introduced in this court room?
>
> "A. I certainly could, Judge. Not that I want to sit here, but I can give the man as fair a trial as I would expect."
>
> (Tr., Vol. 6, p. 3849, ll. 18-23.)

Juror Jasper Johnson testified that he had an impression as to the guilt of the Petitioner. This juror was also questioned by the court as follows:

> "Q. Now, Mr. Johnson, I believe on numerous occasions you have told counsel on both sides and also told this court that regardless of any opinion or impression that you ever had, that you could lay that impression aside and try this case solely upon the law and the evidence introduced here and arrive at your ver-

dict solely upon the law and evidence as introduced in this court room, is that right?

"A. Yes, sir.

"Q. And that's the way you feel about it?

"A. Yes, Sir."

(Tr., Vol. 6, p. 3852, ll. 17-27.)

JUROR PHILIP MONTGOMERY also testified that he had an opinion regarding the guilt of the Petitioner. Further examination of the transcript discloses that he also stated that his opinion was not formed as to Petitioner in particular (Tr., Vol. 6, p. 3853, ll. 7-12). On further questioning by the court the following appears:

"Q. Mr. Montgomery, I will ask you whether or not you have been examined on this matter on several different occasions both by the State and the defense?

"A. Yes, sir, I have.

"Q. And I believe you stated at that time on all of these examinations that even though you might have at one time had an opinion, that you would lay that opinion aside and give this man a fair and impartial trial based solely and entirely upon the law and evidence introduced in this court room?

"A. I did that, sir.

"Q. And that's what you will do?

"A. Yes, sir."

(Tr., Vol. 6, p. 3855, ll. 18-30.)

JUROR NEWMAN GWALTNEY, upon examination by the trial court, testified that he had not formed any opinion as to the guilt or innocence of the defendant.

(Tr., Vol. 6, p. 3897, l. 25, to p. 3898, l. 9.)

JUROR EUGENE PEMBERTON. An examination of the matter set out by the Petitioner in his Brief at page 56 clearly discloses that juror Pemberton qualified in that he expressly stated in response to several questions that he did not have an opinion as to the guilt or innocence of the defendant.

JUROR RALPH W. BAILEY testified that he had a belief that the Petitioner was guilty and that he had formed such opinion from reading the newspaper articles concerning this case. However, on further examination, this juror testified as follows:

"A. No, I don't say I have formed an opinion, I believe if it can be proven in court that the man is guilty, that's the way I would feel about it.

"Q. That's the way it should be.

"A. That's right.

"Q. But you mean to tell me, though, after reading all these matters in the newspapers, having all the conversation there where you worked, that from reading those newspapers and hearing these different stories, you didn't form any opinion as to the defendant's guilt or innocence?

"A. No, I don't believe I have yet. As I say, I believe it is up to the court to prove the man guilty.

"Q. Up to the Prosecutor?

"A. Yes, sir, the Prosecuting Attorney."

(Tr., Vol. 6, p. 4298, ll. 16-30.)

It is submitted that an examination of the foregoing and an examination of the entire record clearly discloses that every juror was honest enough to state that he had read the newspaper articles of the alleged crime and that he had heard radio broadcasts concerning said crime. Yet, at the same time, it is obvious from an examination of the record that the jurors learned much more from the questions propounded by defense counsel than they had learned previously from outside sources. The tactics of the defense counsel seemed to have been first to inform the prospective juror not only of the publicity concerning the crime in question, but also as to the other alleged crimes committed both in Indiana and Kentucky. And after having so informed a prospective juror, counsel would then turn to the Court and would in substance state: "This man is now informed as to the alleged crime at issue and of other alleged crimes which he should not consider to such an extent that he is disqualified." This general procedure is demonstrated by the following:

"Q. You expressed, also, an opinion that the defendant had confessed to this particular crime.

"A. I don't believe I have. I don't remember even reading that he confessed. In fact, I learned more sitting here than I remembered about what I read in the paper."

(Tr., Vol. 6, p. 3888, ll. 23-27.)

At page 82 of his brief, the petitioner cites *Coughlin v. People* (1893), 144 Ill. 140, for the proposition that due process requires that every member of the jury must be fair and impartial toward the accused. An examination of this case discloses that the Illinois court was there concerned with a statute very similar to the above-quoted Indiana statute. The Court specifically held that such a statute properly applied did not violate the defendant's constitutional rights. However, the Court there examined the evidence and found that the examination of the jurors disclosed that they were individually prejudiced against a certain secret society to which the defendant belonged. The Court thus found that the jurors did not qualify under the Illinois statute.

The necessity of coping with this difficult situation was recognized by this Court as early at 1878 when it stated:

> "* * * The theory of the law is that a juror who has formed an opinion cannot be impartial. Every opinion which he may entertain need not necessarily have that effect. In these days of newspaper enterprise and universal education, every case of public interest is almost, as a matter of necessity, brought to the attention of all the intelligent people in the vicinity, and scarcely any one can be found among those best fitted for jurors who has not read or heard of it, and who has not some impression or some opinion in respect to its merits. It is clear, therefore, that upon the trial of the issue of fact raised by a challenge for such cause the court will practically be called upon to determine whether the nature and strength of the opinion formed are such as in law necessarily to raise the presumption of partiality. The question thus presented is one of mixed law and fact, and to be

tried, as far as the facts are concerned, like any other issue of that character, upon the evidence. The finding of the trial court upon that issue ought not to be set aside by a reviewing court, unless the error is manifest. * * *"

Reynolds v. United States (1878), 98 U. S., 145, 155, 25 L. Ed. 244.

This same question arose upon the application of a similar New York statute and this Court made the following observation:

"The petitioners assert that, in view of unfair and lurid newspaper publicity, it was impossible to obtain an impartial jury in the county of trial, and that the rulings of the court denying a change of venue, and on challenges to prospective jurors, resulted in the impanelling of a jury affected with bias. We have examined the record and are unable, as the court below was, to conclude that a convincing showing of actual bias on the part of the jury which tried the defendants is established. Though the statute governing the selection of the jurors and the court's rulings on challenges are asserted to have worked injustice in the impanelling of a jury, *such assertion raises no due process question* requiring review by this court." (Italics supplied.)

Buchalter v. New York (1943), 319 U. S. 427, 430, 63 S. Ct. 1129, 87 L. Ed. 1492.

In view of the position taken by this Court with regard to the ability of trial courts to control newspaper comment on pending litigation, (see: *Craig v. Harney* (1947), 331 U. S. 367, 67 S. Ct. 1249, 91 L. Ed. 1546; *Pennekamp v. Florida* (1946), 328 U. S. 331, 66 S. Ct. 1029, 90 L. Ed. 1295; *Bridges v. California* (1941), 314 U. S. 252, 62 S. Ct. 190, 86 L. Ed. 192). It becomes apparent that statute-

such as the Indiana statutes above quoted are an essential tool for the use of a trial court in the conduct of criminal cases. The real question then before this Court with regard to the qualification of jurors is whether or not the trial judge made proper application of the statute. An examination of the entire record on *voir dire* clearly indicates that the prospective jurors had been influenced only by newspaper publicity not unlike publicity attendant to the commission of any heinous crime. The answers given by these prospective jurors were not unlike answers one could logically expect from laymen who had a normal interest in current events. They were merely attempting to answer the questions of the court and counsel in a forthright manner. It is inconceivable that their answers could have been otherwise at the time of the trial or at any subsequent time to and including the present date. The *voir dire* examination in its entirety discloses a desire on the part of these jurors to decide the case solely upon the evidence presented in the course of the trial.

II

IN ANSWER TO PETITIONER'S CONTENTIONS UNDER PART II OF HIS ARGUMENT STARTING IN HIS BRIEF AT PAGE 83

Under the second point of his brief petitioner claims a violation of his constitutional rights in that he was denied a change of venue from Gibson County after having received a previous change of venue from Vanderburgh County. In so claiming the petitioner submits that Burns' Indiana Statutes (1956 Repl.), Section 9-1305, is unconstitutional. Judge Schnackenberg of the Seventh Circuit noted in his Opinion that this question as to the constitu-

tionality of the Indiana venue statute was raised for the first time in that Court, not having been raised in the Indiana Supreme Court, *Irvin v. State* (1957), 236 Ind. 384, 139 N. E. (2d) 898, nor in the Federal District Court, *Irvin v. Dowd* (1957), 153 F. Supp. 531, 536. This Court has previously stated that a Federal court of review will not consider a constitutional question which has not been raised in the lower court. This rule is invariably adhered to in cases from State courts.

> *Yakus v. United States* (1944), 321 U. S. 414, 444, 64 S. Ct. 660, 88 L. Ed. 834.

However, Judge Schnackenberg, saw fit to deal with this question and points out that the petitioner cited no Federal court decisions to sustain his contention. The petitioner did cite the dissening Opinion of Judge Emmert in *State ex rel. Fox v. LaPorte Circuit Court* (1957), 236 Ind. 69, 138 N. E. (2d) 875, and the subsequent companion case of *State ex rel. Gannon v. Porter Circuit Court* (1959), — Ind. —, 159 N. E. (2d) 713. An examination of Judge Emmert's dissenting Opinion in the Fox case discloses that he based his Opinion on the fact that the trial court judge had in fact found that the defendant could not have a fair trial in LaPorte County and therefore he would order the venue changed.

In the subsequent Gannon case, the Supreme Court allowed the change of venue when the prosecuting attorney also conceded that a fair trial could not be had in LaPorte County. In the case at bar the trial judge ruled against the petitioner, therefore, we do not have the same factual situation in this case as in the Fox and Gannon cases. They are, therefore, no authority for the position here taken by the petitioner.

III

IN ANSWER TO PETITIONER'S CONTENTIONS UNDER PART III OF HIS ARGUMENT STARTING IN HIS BRIEF AT PAGE 87

Under the third point of his brief petitioner claims a violation of his constitutional rights in that the trial court refused his motions for continuance.

The question of whether or not a continuance should be granted is a matter resting within the sound discretion of the trial court under Indiana state procedure.

Walker v. State (1894), 136 Ind. 663, 665, 36 N. E. 356.

The question then to be considered is whether or not the trial court abused its discretion in denying the motions for continuance. Respondent would show the Court that the crime was committed on December 23, 1954. Petitioner was arrested on April 8, 1955. On April 13, 1955, petitioner confe sed to the commission of the crime.

(Trial Transcript, Vol. 2, p. 1336, l. 26 to p. 1337, l. 22.)

Thereafter the Vanderburgh County Grand Jury returned an indictment against the petitioner. Subsequently the petitioner asked for and was granted a change of venue from Vanderburgh County. It was not until November 14, 1955, that the *voir dire* examinations began in Gibson County. This was almost eleven months after the crime had been committed and eight months after the petitioner had made his confessions which had been highly publicized in Vanderburgh County. When one considers the elapse

of time between petitioner's arrest and the trial in Gibson Circuit Court it becomes apparent that there was no abuse of discretion on the part of the trial court in not granting any further delay of the trial. If the contentions of the petitioner are to be carried to a logical conclusion the trial court would have no alternative but to eventually dismiss the case because of an inability to secure an impartial jury.

In support of his position at page 90 of his brief petitioner cites the case of *Liese v. State* (1954), 233 Ind. 250, 118 N. E. (2d) 781. At page 254, the Supreme Court of Indiana stated that such an application is addressed to the sound discretion of the trial court whose ruling may not be disturbed in the absence of the abuse of that discretion. There is no claim in this case by the petitioner that he was subjected to any disorderly conduct in or about the jail or the trial court or that he at any time feared for his safety because of bias and prejudice which he alleges existed in Gibson County. His only claim to prejudicial treatment is his claim that the jurors who tried the case were prejudiced against him. The record in this case clearly demonstrates that the jurors were carefully and properly qualified under the Indiana statute, thus petitioner received every constitutional and statutory guarantee afforded him under the Indiana law and the Constitution of the United States.

The United States Constitution, Fourteenth Amendment;

Indiana Constitution, Article 1, Section 13,

Indiana Acts 1905, Ch. 169, Sec. 230, as found in Burns' Indiana Statutes (1956 Repl.), Section 9-1504.

In his brief at page 93 petitioner quotes from the case of *Shepherd et al. v. Florida* (1951), 341 U. S. 50, 71 S. Ct. 549, 95 L. Ed. 740, for the proposition that the petitioner was denied due process by reason of press releases made by authorities. An examination of that case discloses that the local sheriff was quoted by the newspapers as saying that the defendant had confessed to the crime charged. In holding such newspaper publicity would be prejudicial to the defendant, this Court observed that although this supposed confession received wide publicity there was in fact no confession introduced into evidence in the trial court. In the case at bar, although petitioner's confession was referred to in news publications it was in fact properly introduced in evidence after a lengthy hearing as to its admissibility in the trial court. An examination of the various press statements set out by the petitioner in his brief starting at page 98 fails to disclose any language which would indicate that the local authorities were in any way attempting to try their case in newspapers prior to the beginning of the actual trial. The authorities did no more than to briefly and factually answer the questions asked by reporters and nowhere does petitioner claim that authorities were guilty of releasing false information concerning his case.

IV

IN ANSWER TO PETITIONER'S CONTENTIONS UNDER PART IV OF HIS ARGUMENT STARTING IN HIS BRIEF AT PAGE 103

Under the fourth point of his argument petitioner claims denial of due process in that he was not afforded hearings on his motions for continuance and change of venue.

Under the Indiana statute above cited the petitioner was limited to one change of venue which he had in fact received. A continuance was a matter within the sound discretion of the trial court.

Walker v. State (1894), 136 Ind. 663, 665, 36 N. E. 356, *supra.*

The facts upon which the trial court exercised that discretion are as follows: The trial did not start until almost eleven months after the crime had been committed and eight months after the petitioner had confessed to the crime. These facts were contained in the trial court's intrinsic record of which he could take judicial notice. Under the circumstances it is submitted that a hearing would have been no aid to the trial judge in passing upon the granting of a continuance. The real question before the trial judge was whether or not at that time an impartial jury could in fact be obtained. The record discloses that he patiently and carefully proceeded through the *voir dire* examination and did in fact obtain a jury which was as well qualified as one could expect to obtain in a criminal case of great notoriety irrespective of the time of the trial with relation to the time of the commission of the offense.

V

IN ANSWER TO PETITIONER'S CONTENTIONS UNDER PART V OF HIS ARGUMENT STARTING IN HIS BRIEF AT PAGE 105

Under the fifth point of his argument petitioner states that the trial court refused to permit him to introduce evidence including his own testimony in support of his offer to prove the involuntary nature of his confession.

Petitioner has persisted in making this false allegation at every presentation of this case in the various Federal courts including the prior brief in this Court. Respondent would again refer the Court to the trial transcript which clearly discloses that an extensive hearing was had in the absence of the jury as to the arrest of the petitioner, his treatment while in custody and the manner in which his confession was obtained. The record of this hearing starts in the trial transcript in vol. 2, page 1306, and continues to vol. 3, page 1613. The particular objection to which petitioner refers in his point 5 came immediately following this extensive hearing. It would have been utterly ridiculous for the court to have repeated the hearing which it had just completed. The record clearly discloses that the petitioner was afforded every opportunity to question every phase of his incarceration and confession. He completely failed to demonstrate that he had been denied due process of law at any step beginning with his arrest and ending with his indictment by the Vanderburgh County Grand Jury. The record is clear and uncontradicted that petitioner was well treated at all times and that his confession was not only voluntary but in fact anxiously given in the hope that he would escape prosecution in the State of Kentucky.

VI

IN ANSWER TO PETITIONER'S CONTENTIONS UNDER PART VI OF HIS ARGUMENT STARTING IN HIS BRIEF AT PAGE 108

In point six of his brief petitioner claims a violation of due process of law in that the prosecuting attorney was permitted to participate as such prosecutor through the

course of the trial and also was permitted to testify as a witness on behalf of the State.

An examination of Paul Wever's testimony as a witness for the State discloses that he testified to nothing except statements made directly to him by the petitioner. This evidence was cumulative having been testified to by officers who were also present at the interview. At no time during the course of the trial was Paul Wever guilty of any misconduct such as that in the case of *Berger v. United States* (1935), 295 U. S. 78, 55 S. Ct. 629, relied upon by the petitioner in support of this point. Although as pointed out by the petitioner and by Judge Duffy in his dissenting Opinion in the Circuit Court of Appeals for the Seventh Circuit, this conduct on the part of Paul Wever is contrary to Canon 19 of the Canon for Professional Ethics, there is no showing that it in any way violated petitioner's right to due process of law. The jury was properly instructed that they could consider the interest of any witness in weighing his testimony. A search of the record discloses that every statement Paul Wever made on the witness stand is well supported by independent evidence from other witnesses. It is therefore submitted that this charge does not support the petitioner's contention of a denial of due process.

VII.

IN ANSWER TO PETITIONER'S CONTENTIONS UNDER PART VII OF HIS ARGUMENT STARTING IN HIS BRIEF AT PAGE 114

Under point seven of his brief petitioner claims that he was denied a fair trial and that he did not have an opportunity to prove actual bias of certain jurors.

The question as to the bias and prejudice of the various jurors has been covered in previous parts of this brief. This contention of the petitioner in view of the record of the trial court is completely unwarranted. The record disclosed that each juror was extensively examined by the petitioner and that at no time was he ever deprived of his right to examine a prospective juror. If for the sake of argument it is conceded that an offer to prove can be used in the manner here attempted the offers as made by the petitioner fail to disclose facts upon which he based his offers, but merely recite conclusions based upon the prospective juror's prior testimony. The trial court properly overruled such offers to prove.

Malone v. State (1911), 176 Ind. 338, 343, 96 N. E. 1.

CONCLUSION

Respondent respectfully submits that the Circuit Court of Appeals for the Seventh Circuit was correct in finding that the trial court afforded the petitioner every constitutional right under the Fourteenth Amendment to the Consitution of the United States.

Wherefore, Respondent prays that the Opinion and decision of the Circuit Court of Appeals be affirmed.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES

No. 41.—October Term, 1960.

Leslie Irvin, Petitioner, v. A. F. Dowd, Warden.	On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

[June 5, 1961.]

Mr. Justice Clark delivered the opinion of the Court.

This is a habeas corpus proceeding, brought to test the validity of petitioner's conviction for murder and sentence of death in the Circuit Court of Gibson County, Indiana. The Indiana Supreme Court affirmed the conviction in *Irvin* v. *State*, 236 Ind. 384, 139 N. E. 2d 898, and we denied direct review by certiorari "without prejudice to filing for federal habeas corpus after exhausting state remedies." 353 U. S. 948. Petitioner immediately sought a writ of habeas corpus, under 28 U. S. C. § 2241,[1] in the District Court for the Northern District of Indiana, claiming that his conviction had been obtained in violation of the Fourteenth Amendment in that he did not receive a fair trial. That court dismissed the proceeding on the ground that petitioner had failed to exhaust his state remedies. 153 F. Supp. 531. On appeal, the Court of Appeals for the Seventh Circuit affirmed the dismissal. 251 F. 2d 548. We granted certiorari, 356 U. S. 948, and

[1] Section 2241 provides in pertinent part:

"(a) Writs of habeas corpus may be granted by the . . . district courts . . . within their respective jurisdictions.

"(c) The writ of habeas corpus shall not be extended to a prisoner unless . . .

"(3) He is in custody in violation of the Constitution or laws or treaties of the United States. . . ."

remanded to the Court of Appeals for decision on the merits or remand to the District Court for reconsideration. 359 U. S. 394. The Court of Appeals retained jurisdiction and decided the claim adversely to petitioner. 271 F. 2d 552. We granted certiorari, 361 U. S. 959.

As stated in the former opinion, 359 U. S., at 396–397:

> "The constitutional claim arises in this way. Six murders were committed in the vicinity of Evansville, Indiana, two in December 1954, and four in March 1955. The crimes, extensively covered by news media in the locality, aroused great excitement and indignation throughout Vanderburgh County, where Evansville is located, and adjoining Gibson County, a rural county of approximately 30,000 inhabitants. The petitioner was arrested on April 8, 1955. Shortly thereafter, the Prosecutor of Vanderburgh County and Evansville police officials issued press releases, which were intensively publicized stating that the petitioner had confessed to the six murders. The Vanderburgh County Grand Jury soon indicted the petitioner for the murder which resulted in his conviction. This was the murder of Whitney Wesley Kerr allegedly committed in Vanderburgh County on December 23, 1954. Counsel appointed to defend petitioner immediately sought a change of venue from Vanderburgh County, which was granted, but to adjoining Gibson County. Alleging that the widespread and inflammatory publicity had also highly prejudiced the inhabitants of Gibson County against the petitioner, counsel, on October 29, 1955, sought another change of venue, from Gibson County to a county sufficiently removed from the Evansville locality that a fair trial would not be prejudiced. The motion was denied, apparently because the pertinent Indiana statute allows only a single change of venue."

During the course of the *voir dire* examination, which lasted some four weeks, petitioner filed two more motions for a change of venue and eight motions for continuances. All were denied.

At the outset we are met with the Indiana statute providing that only one change of venue shall be granted "from the county" wherein the offense was committed.[2] Since petitioner had already been afforded one change of venue, and had been denied further changes solely on the basis of the statute, he attacked its constitutionality. The Court of Appeals upheld its validity. However, in the light of *Gannon* v. *Porter Circuit Court*, — Ind. —, 159 N. E. 2d 713, we do not believe that argument poses a serious problem. There the Indiana Supreme Court held that if it was "made to appear after attempt has actually been made to secure an impartial jury that such jury could not be obtained in the county of present venue . . . it becomes the duty of the judiciary to provide to every accused a public trial by an impartial jury, even though to do so the court must grant a second change of venue and thus contravene [the statute] . . . ." — Ind., at —, 159 N. E. 2d, at 715. The prosecution attempts to distinguish that case on the ground that the District Attorney there conceded that a fair trial could not be had in La Porte County and that the court, therefore, properly ordered a second change of venue despite the language of the statute. Inasmuch as the statute says nothing of concessions, we do not believe that the Indiana Supreme Court conditions the

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[2] Burns' Ind. Stat. Ann., 1956 Replacement Vol., § 9-1305, provides in pertinent part: "When affidavits for a change of venue are founded upon excitement or prejudice in the county against the defendant, the court, in all cases not punishable by death, may, in its discretion, and in all cases punishable by death, shall grant a change of venue to the most convenient county. . . . Provided, however, That only one [1] change of venue from the judge and only one [1] change from the county shall be granted."

duty of the judiciary to transfer a case to another county solely upon the representation by the prosecutor—regardless of the trial court's own estimate of local conditions—that an impartial jury may not be impaneled. As we read *Gannon*, it stands for the proposition that the necessity for transfer will depend upon the totality of the surrounding facts. Under this construction the statute is not, on its face, subject to attack on due process grounds.

England, from whom the Western World has largely taken its concepts of individual liberty and of the dignity and worth of every man, has bequeathed to us safeguards for their preservation, the most priceless of which is that of trial by jury. This right has become as much American as it was once the most English. Although this Court has said that the Fourteenth Amendment does not demand the use of jury trials in a State's criminal procedure, *Fay* v. *New York*, 332 U. S. 261; *Palko* v. *Connecticut*, 302 U. S. 319, every State has constitutionally provided trial by jury. See Columbia University Legislative Drafting Research Fund, Index Digest of State Constitutions 578–579 (1959). In essence, the right to jury trial guarantees to the criminally accused a fair trial by a panel of impartial, "indifferent" jurors. The failure to accord an accused a fair hearing violates even the minimal standards of due process. *In re Oliver*, 333 U. S. 257; *Tumey* v. *Ohio*, 273 U. S. 510. "A fair trial in a fair tribunal is a basic requirement of due process." *In re Murchison*, 349 U. S. 133, 136. In the ultimate analysis, only the jury can strip a man of his liberty or of his life. In the language of Lord Coke, a juror must be as "indifferent as he stands unsworn." Co. Litt. 155b. His verdict must be based upon the evidence developed at the trial. Cf. *Thompson* v. *City of Louisville*, 362 U. S. 199. This is true, regardless of the heinousness of the crime charged, the apparent guilt of the offender or the station in life which he occupies. It was so written into our law as early

as 1807 by Chief Justice Marshall in 1 Burr's Trial 416 (1807).[3] "The theory of the law is that a juror who has formed an opinion cannot be impartial." *Reynolds* v. *United States*, 98 U. S. 145, 155.

It is not required, however, that the jurors be totally ignorant of the facts and issues involved. In these days of swift, widespread and diverse methods of communication, an important case can be expected to arouse the interest of the public in the vicinity, and scarcely any of those best qualified to serve as jurors will not have formed some impression or opinion as to the merits of the case. This is particularly true in criminal cases. To hold that the mere existence of any preconceived notion as to the guilt or innocence of an accused, without more, is sufficient to rebut the presumption of a prospective juror's impartiality would be to establish an impossible standard. It is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court. *Spies* v. *Illinois*, 123 U. S. 131; *Holt* v. *United States*, 218 U. S. 245; *Reynolds* v. *United States*, *supra*.

The adoption of such a rule, however, "cannot foreclose inquiry as to whether, in a given case, the application of that rule works a deprivation of the prisoner's life or liberty without due process of law." *Lisenba* v. *California*, 314 U. S. 219, 236. As stated in *Reynolds*, the test is "whether the nature and strength of the opinion formed are such as in law necessarily . . . raise the presumption of partiality. The question thus presented is one of

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[3] "[L]ight impressions which may fairly be supposed to yield to the testimony that may be offered; which may leave the mind open to a fair consideration of that testimony, constitute no sufficient objection to a juror; but that those strong and deep impressions, which will close the mind against the testimony that may be offered in opposition to them; which will combat that testimony and resist its force, do constitute a sufficient objection to him."

mixed law and fact. . . ." At p. 156. "The affirmative of the issue is upon the challenger. Unless he shows the actual existence of such an opinion in the mind of the juror as will raise the presumption of partiality, the juror need not necessarily be set aside . . . . If a positive and decided opinion had been formed, he would have been incompetent even though it had not been expressed." At p. 157. As was stated in *Brown* v. *Allen*, 344 U. S. 443, 507, the "so-called mixed questions or the application of constitutional principles to the facts as found leave the duty of adjudication with the federal judge." It was, therefore, the duty of the Court of Appeals to independently evaluate the *voir dire* testimony of the impaneled jurors.

The rule was established in *Reynolds* that "[t]he finding of the trial court upon that issue [the force of a prospective juror's opinion] ought not be set aside by a reviewing court, unless the error is manifest." 98 U. S., at 156. In later cases this Court revisited *Reynolds*, citing it in each instance for the proposition that findings of impartiality should be set aside only where prejudice is "manifest." *Holt* v. *United States*, *supra*; *Spies* v. *Illinois*, *supra*; *Hopt* v. *Utah*, 120 U. S. 430. Indiana agrees that a trial by jurors having a fixed, preconceived opinion of the accused's guilt would be a denial of due process, but points out that the *voir dire* examination discloses that each juror qualified under the applicable Indiana statute.[4]

[4] "Challenges for cause.—The following shall be good causes for challenge to any person called as a juror in any criminal trial:

"Second. That he has formed or expressed an opinion as to the guilt or innocence of the defendant. But if a person called as a juror states that he has formed or expressed an opinion as to the guilt or innocence of the defendant, the court or the parties shall thereupon proceed to examine such juror on oath as to the ground of such opinion; and if it appears to have been founded upon reading

It is true that the presiding judge personally examined those members of the jury panel whom petitioner, having no more peremptory challenges, insisted should be excused for cause, and that each indicated that notwithstanding his opinion he could render an impartial verdict. But as Chief Justice Hughes observed in *United States* v. *Wood*, 299 U. S. 123, 145-146: "Impartiality is not a technical conception. It is a state of mind. For the ascertainment of this mental attitude of appropriate indifference, the Constitution lays down no particular tests and procedure is not chained to any ancient and artificial formula."

Here the buildup of prejudice is clear and convincing. An examination of the then current community pattern of thought as indicated by the popular news media is singularly revealing. For example, petitioner's first motion for a change of venue from Gibson County alleged that the awaited trial of petitioner had become the *cause célèbre* of this small community—so much so that curbstone opinions, not only as to petitioner's guilt but even as to what punishment he should receive, were solicited and recorded on the public streets by a roving reporter, and later were broadcast over the local stations. A reading of the 46 exhibits which petitioner attached to his motion indicates that a barrage of newspaper headlines, articles, cartoons and pictures was unleashed against him during the six or seven months

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newspaper statements, communications, comments or reports, or upon rumors or hearsay, and not upon conversation with witnesses of the transaction, or reading reports of their testimony, or hearing them testify, and the juror states on oath that he feels able, notwithstanding such opinion, to render an impartial verdict upon the law and evidence, the court, if satisfied that he is impartial and will render such verdict, may, in its discretion, admit him as competent to serve in such case." Burns' Ind. Stat. Ann. § 1956 Replacement Vol., § 9-1504.

preceding his trial. The motion further alleged that the newspapers in which the stories appeared were delivered regularly to approximately 95% of the dwellings in Gibson County and that, in addition, the Evansville radio and TV stations, which likewise blanketed that county, also carried extensive newscasts covering the same incidents. These stories revealed the details of his background, including a reference to crimes committed when a juvenile, his convictions for arson almost 20 years previously, for burglary and by a court-martial on AWOL charges during the war. He was accused of being a parole violator. The headlines announced his police line-up identification, that he faced a lie detector test, had been placed at the scene of the crime and that the six murders were solved but petitioner refused to confess. Finally, they announced his confession to the six murders and the fact of his indictment for four of them in Indiana. They reported petitioner's offer to plead guilty if promised a 99-year sentence, but also the determination, on the other hand, of the prosecutor to secure the death penalty, and that petitioner had confessed to 24 burglaries (the *modus operandi* of these robberies was compared to that of the murders and the similarity noted). One story dramatically relayed the promise of a sheriff to devote his life to securing petitioner's execution by the State of Kentucky, where petitioner is alleged to have committed one of the six murders, if Indiana failed to do so. Another characterized petitioner as remorseless and without conscience but also as having been found sane by a court-appointed panel of doctors. In many of the stories petitioner was described as the "confessed slayer of six," a parole violator and fraudulent-check artist. Petitioner's court-appointed counsel was quoted as having received "much criticism over being Irvin's counsel" and it was pointed out, by way of excusing the attorney, that he would be subject to disbarment should he refuse to repre-

sent Irvin." On the day before the trial the newspapers carried the story that Irvin had orally admitted the murder of Kerr (the victim in this case) as well as "the robbery-murder of Mrs. Mary Holland; the murder of Mrs. Wilhemina Sailer in Posey County, and the slaughter of three members of the Duncan family in Henderson County, Ky."

It cannot be gainsaid that the force of this continued adverse publicity caused a sustained excitement and fostered a strong prejudice among the people of Gibson County. In fact, on the second day devoted to the selection of the jury, the newspapers reported that "strong feelings, often bitter and angry, rumbled to the surface," and that "the extent to which the multiple murders—three in one family—have aroused feelings throughout the area was emphasized Friday when 27 of the 35 prospective jurors questioned were excused for holding biased pretrial opinions. . . ." A few days later the feeling was described as "a pattern of deep and bitter prejudice against the former pipe-fitter." Spectator comments, as printed by the newspapers, were "my mind is made up"; "I think he is guilty"; and "he should be hanged."

Finally, and with remarkable understatement, the headlines reported that "impartial jurors are hard to find." The panel consisted of 430 persons. The court itself excused 268 of those on challenges for cause as having fixed opinions as to the guilt of petitioner; 103 were excused because of conscientious objection to the imposition of the death penalty; 20, the maximum allowed, were peremptorily challenged by petitioner and 10 by the State; 12 persons and two alternates were selected as jurors and the rest were excused on personal grounds, *e. g.*, deafness, doctor's orders, etc. An examination of the 2,783-page *voir dire* record shows that 370 prospective jurors or almost 90% of those examined on the point (10 members of the panel were never asked whether or not they had any opin-

ion) entertained some opinion as to guilt—ranging in intensity from mere suspicion to absolute certainty. A number admitted that, if they were in the accused's place in the dock and he in their's on the jury with their opinions, they would not want him on a jury.

Here the "pattern of deep and bitter prejudice" shown to be present throughout the community, cf. *Stroble* v. *California*, 343 U. S. 181, was clearly reflected in the sum total of the *voir dire* examination of a majority of the jurors finally placed in the jury box. Eight out of the 12 thought petitioner was guilty. With such an opinion permeating their minds, it would be difficult to say that each could exclude this preconception of guilt from his deliberations. The influence that lurks in an opinion once formed is so persistent that it unconsciously fights detachment from the mental processes of the average man. See *Delaney* v. *United States*, 199 F. 2d 107. Where one's life is at stake—and accounting for the frailties of human nature—we can only say that under the light of the circumstances here the finding of impartiality does not meet constitutional standards. Two-thirds of the jurors had an opinion that petitioner was guilty and were familiar with the material facts and circumstances involved, including the fact that other murders were attributed to him, some going so far as to say that it would take evidence to overcome their belief. One said that he "could not . . . give the defendant the benefit of the doubt that he is innocent." Another stated that he had a "somewhat" certain fixed opinion as to petitioner's guilt. No doubt each juror was sincere when he said that he would be fair and impartial to petitioner, but the psychological impact requiring such a declaration before one's fellows is often its father. Where so many, so many times, admitted prejudice, such a statement of impartiality can be given little weight. As one of the jurors put it, "You can't forget what you hear and see." With his life at

stake, it is not requiring too much that petitioner be tried in an atmosphere undisturbed by so huge a wave of public passion and by a jury other than one in which two-thirds of the members admit, before hearing any testimony, to possessing a belief in his guilt." *Stroble* v. *California*, 343 U. S. 181; *Shepherd* v. *Florida*, 341 U. S. 50 (concurring opinion); *Moore* v. *Dempsey*, 261 U. S. 86.

Petitioner's detention and sentence of death pursuant to the void judgment is in violation of the Constitution of the United States and he is therefore entitled to be freed therefrom. The judgments of the Court of Appeals and the District Court are vacated and the case remanded to the latter. However, petitioner is still subject to custody under the indictment filed by the State of Indiana in the Circuit Court of Gibson County charging him with murder in the first degree and may be tried on this or another indictment. The District Court has power, in a habeas corpus proceeding, to "dispose of the matter as law and justice require." 28 U. S. C. § 2243. Under the predecessors of this section, "this Court has often delayed the discharge of the petitioner for such reasonable time as may be necessary to have him taken before the court where the judgment was rendered, that defects which render discharge necessary may be corrected." *Mahler* v. *Eby*, 264 U. S. 32, 46. Therefore, on remand the District Court should enter such orders as are appropriate and consistent with this opinion, cf. *Grandsinger* v. *Bovey*, 153 F. Supp. 201, 240, which allow the State a reasonable time in which to retry petitioner. Cf. *Chessman* v. *Teets*, 354 U. S. 156; *Dowd* v. *Cook*, 340 U. S. 206; *Ted* v. *Waldman*, 266 U. S. 113.

Vacated and remanded.

SUPREME COURT OF THE UNITED STATES

No. 41.—October Term, 1960.

Leslie Irvin, Petitioner, v. A. F. Dowd, Warden.	On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

[June 5, 1961.]

Mr. Justice Frankfurter, concurring.

Of course I agree with the Court's opinion. But this is, unfortunately, not an isolated case that happened in Evansville, Indiana, nor an atypical miscarriage of justice due to anticipatory trial by newspapers instead of trial in court before a jury.

More than one student of society has expressed the view that not the least significant test of the quality of a civilization is its treatment of those charged with crime, particularly with offenses which arouse the passions of a community. One of the rightful boasts of Western civilization is that the State has the burden of establishing guilt solely on the basis of evidence produced in court and under circumstances assuring an accused all the safeguards of a fair procedure. These rudimentary conditions for determining guilt are inevitably wanting if the jury which is to sit in judgment on a fellow human being comes to its task with its mind ineradicably poisoned against him. How can fallible men and women reach a disinterested verdict based exclusively on what they heard in court when, before they entered the jury box, their minds were saturated by press and radio for months preceding by matter designed to establish the guilt of the accused. A conviction so secured obviously constitutes a denial of due process of law in its most rudimentary conception.

Not a Term passes without this Court being importuned to review convictions had in States throughout the country, in which substantial claims are made that a jury trial has been distorted because of inflammatory newspaper accounts—too often, as in this case, with the prosecutor's collaboration—exerting pressures upon potential jurors before trial and even during the course of trial, thereby making it extremely difficult, if not impossible, to secure a jury capable of taking in, free of prepossessions, evidence submitted in open court. Indeed such extraneous influences, in violation of the decencies guaranteed by our Constitution, are sometimes so powerful that an accused is forced, as a practical matter, to forego trial by jury. See *Maryland* v. *Baltimore Radio Show*, 338 U. S. 912, 915. For one reason or another this Court does not undertake to review all such envenomed state prosecutions. But, again and again, such disregard of fundamental fairness is so flagrant that the Court is compelled, as it was only a week ago, to reverse a conviction in which prejudicial newspaper intrusion has poisoned the outcome. *Janko* v. *United States*, *ante*, p. —; see, *e. g.*, *Marshall* v. *United States*, 360 U. S. 310. See also *Stroble* v. *California*, 343 U. S. 181, 198 (dissenting opinion); *Shepherd* v. *Florida*, 341 U. S. 50 (concurring opinion). This Court has not yet decided that the fair administration of criminal justice must be subordinated to another safeguard of our constitutional system—freedom of the press, properly conceived. The Court has not yet decided that, while convictions must be reversed and miscarriages of justice result because the minds of jurors or potential jurors were poisoned, the poisoner is constitutionally protected in plying his trade.